89-33

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RIQUE DON BOBBITT,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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30 pp

QUESTION PRESENTED

(1) Whether a retroactive application of the Texas Court of Criminal Appeals' opinion in *Meshell v. State,* 739 S.W.2d 246 (Tex. Cr. App. 1987), which declared this state's Speedy Trial Act unconstitutional (Articles 28.061, 32A.01 and 02, Texas Code of Criminal Procedure), amounts to an *ex post facto* violation as it relates to petitioner, who had prevailed on his claim in the Court of Appeals?

Petitioner submits that the Texas Court of Criminal Appeals has decided an important question of federal law which is in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

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THE STATE OF TEXAS,
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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals, First Supreme Judicial District of Texas, sitting at Houston, Texas, reversing the district court, dismissing the indictment, and barring further prosecution, was unpublished. It is reprinted in the Appendix at A-1, together with the unpublished opinion of the Texas Court of Criminal Appeals sustaining the state's posture that the unconstitutionality of the Act should be retroactive, and refusal on petitioner's motion for rehearing.

JURISDICTION

The original opinion of the Texas court of appeals was issued on March 12, 1987. The state filed its first petition for review on April 27, 1987. It was refused on April 27, 1988. The state filed its second petition for review on May 11, 1988. It was granted on May 25, 1988. The brief in support of petition for review was filed on June 23, 1988. Petitioner filed his response to the state's brief on August 8, 1988. On April 12, 1989, the Texas Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court claiming, silently, that the unconstitutionality of the Speedy Trial Act applied retroactively. Petitioner's motion for rehearing was overruled without written opinion on May 10, 1989.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves U.S.C. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

STATEMENT OF THE CASE

Petitioner was arrested on October 12, 1985, and charged with public intoxication and possession of cocaine. The public intoxication charge was filed in the Municipal Court of the City of Pasadena, Texas. Pasadena Municipal Court Judge Dan Weathers dismissed the public intoxication charge pursuant to the Speedy Trial Act. (Art. 32A.02, *Texas Code of Criminal Procedure.*) In the cocaine case, petitioner filed a pretrial plea in bar

arguing that the dismissal of the public intoxication charge required the court to dismiss the possession of cocaine charge pursuant to Art. 28.061, Texas Code of Criminal Procedure. The trial court overruled the plea in bar. (See court of appeal's opinion).

Article 28.061 provides that:

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by Art. 32A.02 is sustained, the trial court shall discharge the defendant. A discharge under this Article is a bar to any further prosecution of the offense discharged or for any other offense arising out of the same transaction.

At the pretrial hearing, the state stipulated that the public intoxication and the cocaine charges arose from the same transaction. The court of appeals reversed the trial court, dismissed the indictment, and barred further prosecution premised upon *Kalish v. State,* 662 S.W.2d 595 (Tex. Cr. App. 1983).

REASONS FOR GRANTING THE WRIT

The decision in *Meshell v. State,* 739 S.W.2d 246, declaring the Speedy Trial Act unconstitutional, was issued on July 1, 1987. The petitioner committed the offense on October 12, 1985, went to trial on March 2 and 3, 1986, was convicted, and gave notice of appeal. The Texas court of appeals, in an unpublished opinion, dismissed the indictment and barred further prosecution on March 12, 1987.

Clay v. Lynaugh, 846 F.2d 8 (5th Cir. 1988) and *Rubino v. Lynaugh,* 845 F.2d 1266 (5th Cir. 1988), and several opinions of this Court render an *ex post facto* application of this judicial decision, notwithstanding the statutory implication, invalid. Consequently, the language in *Jefferson v. State,* 751 S.W.2d 502 (Tex. Cr. App. 1988), viz, an unconstitutional statute is void from its inception and cannot provide a basis for any right or relief is, at best, ill conceived.

The language in *Jefferson* was apparently drawn from *Norton v. Shelby County,* 118 U.S. 425, 442, 3 L.Ed. 178, 186, 6 S. Ct. 1121; however, that principle was repudiated in *Chicote County Drainage v. Baxter State Bank,* 308 U.S. 371, 84 L.Ed. 329 (1940):

> The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a loss; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is a operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relation, individual and corporate, and particular conduct, private and official. Questions of rights claim to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of

> the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Id. at 331, 332.

In *Beazell v. Ohio,* 269 U.S. 167, 169-170, 70 L.Ed. 216, 46 S. Ct. 68 (1925), Mr. Justice Stone summarized for the Court the characteristics for an *ex post facto* law:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime and act previously committed, which was innocent when done; which makes more burdensome the punishment for the crime after its commission, *or which deprives one charged with* [*a*] *crime of any defense available according to law at the time when the act was committed,* is prohibited as *ex post facto.*

Accord, Miller v. Florida, 482 U.S. ____ 96 L.Ed.2d 351, 107 S. Ct. ____ (1987) and *Dobbert v. Florida,* 432 U.S. 282, 53 L.Ed.2d 344, 97 S. Ct. 2290 (1977).

Rubino, supra, the companion case to *Clay,* cited *Miller,* wherein Justice O'Conner wrote, "a change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.' "

Petitioner concedes the Act was procedural in form, but when the decision by the Texas Court of Criminal Appeals declaring it unconstitutional was applied retroactively, it deprived him of an available defense he had

on the date of the offense, at trial, and in the court of appeals, viz, the state's failure to be ready for trial within the time prescribed by the Act and the petitioner's proof thereof. *Chicote County Drainage,* supra, *Beazell v. Ohio,* supra, *Miller v. Florida,* supra, *Dobbert v. Florida,* supra.

Furthermore, to hold that the *ex post facto* application of otherwise unassailable changes in statutory law presents no state and federal due process issue runs afoul of *Rubino, Clay, Miller,* and *Kring v. Missouri,* 107 U.S. 221, 2 S. Ct. 443, 27 L.Ed. 506 (1883).

The Texas Court of Criminal Appeals declined to answer petitioner's claim of *ex post facto* just as it did in *Ex parte Clay,* 675 S.W.2d 765 (Tex. Cr. App. 1984).

CONCLUSION

For the foregoing reasons, petitioner Rique Don Bobbitt asks that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
First Supreme Judicial District

OPINION

NO. 01-86-00549-CR

RIQUE DON BOBBITT, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
of Harris County, Texas
Trial Court Cause No. 434,970.

Pursuant to a plea bargain agreement, appellant pled guilty to possession of cocaine of less than 28 grams, and the trial court assessed punishment at three years confinement, probated, and a $1,000.00 fine. *See* Tex. Code Crim. P. Ann. art. 44.02 (Vernon 1979).

The record reflects that at the time of his arrest, appellant was charged with public intoxication and possession of cocaine. The public intoxication charge was filed in the Municipal Court for the City of Pasadena, Texas. Pasadena Municipal Court Judge Dan Weathers dismissed the public intoxication charge, pursuant to the

Speedy Trial Act. Tex. Code Crim. P. Ann. art. 32A.02 (Vernon Supp. 1987).

In the instant case, appellant filed a pretrial plea in bar arguing that the dismissal of the public intoxication charge required the court to dismiss the possession of cocaine charge, pursuant to Tex. Code Crim. P. Ann. art. 28.061 (Vernon Supp. 1987). The trial court overruled the plea in bar.

Appellant's sole point of error contends that the trial court erred in overruling his plea in bar, because the public intoxication and the cocaine charges arose from the same transaction; the public intoxication complaint had been discharged, pursuant to article 32A.02; and therefore, dismissal of the cocaine charge was required by article 28.061.

Article 28.061 provides that:

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by art. 32A.02 is sustained, the trial court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction.

At the pretrial hearing, the State stipulated that the public intoxication and the cocaine charges arose from the same transaction, as defined by *Kalish v. State,* 662 S.W.2d 595 (Tex. Crim. App. 1983).

In *Kalish,* 662 S.W.2d at 600, the court held that:

> [W]hen a person is detained, placed under restraint or taken into custody by a peace officer, all such

> chargeable voluntary conduct in which the person was then and there engaged, constituting an offense continuing in nature, arises out of the same transaction. . . . [W]e find that [the offense of possession of cocaine and the offense of public intoxication, being committed contemporaneously by appellant, were of the same transaction.

The instant case is indistinguishable from *Kalish.* Both involve the same offenses, public intoxication and possession of cocaine; both involve nearly identical factual observations and testimony by the arresting officer; and both involve the dismissal of a municipal court prosecution barring prosecution in a district court.

The State contends that *Kalish* should be overruled. We have recently relied on *Kalish* to grant relief in a nearly identical situation. *See Ex parte Maddux,* No. 01-86-00462-CR (Tex. App.—Houston [1st Dist.] December 11, 1986). Furthermore, we have no authority to overrule *Kalish.*

The State attempts to distinguish *Kalish,* alleging that the speedy trial issue herein was wrongly decided by the Pasadena Municipal Court. As it did in the trial court, the State attempts to relitigate the order of the Pasadena Municipal Court.

Article 28.061 is a mandatory statute. It does not provide that the defendant shall be discharged only if the trial court's decision granting the speedy trial motion is correct. No authority allows the district court or this Court to review the correctness of the municipal court's judgment. The State's interpretation would allow it to appeal the municipal court judgment, in violation of art. V, sec. 26 of the Texas Constitution. *Ex parte*

Maddux, slip op. at 2 (opinion on State's motion for rehearing). The State does not contend in this argument that the judgment of the municipal court is void, and therefore subject to collateral attack.

The State next contends that the caption of the Speedy Trial Act violates art. III, sec. 35 of the Texas Constitution. In *Baggett v. State,* No. 634-85 (Tex. Crim. App. Jan. 14, 1987) (not yet reported), the court held that, as a result of the amendment to art. III, sec. 35 of the Texas Constitution, courts no longer have the power to declare an act of the legislature unconstitutional due to a defective caption. *Baggett,* slip op. at 2.

Finally, the State contends, as it did in the district court, that the Speedy Trial Act is an unconstitutional violation of the separation of powers doctrine of article II, section 1 of the Texas Constitution.

In *Bedford v. State,* 703 S.W.2d 775, 779 (Tex. App. —Houston [14th Dist.] 1985), the court persuasively rejected an attack on the constitutionality of the Speedy Trial Act. It held:

> We find no authority holding that the legislature may not constitutionally impose time limitations for the prosecution of cases and provide for sanctions, including dismissal, when the state fails to timely prosecute defendants. To the contrary, the Code of Criminal Procedure embodies numerous examples of statutes which provide for such time limitations and sanctions. See, e.g., Tex. Code Crim. Proc. Ann. arts. 12.01-12.07, 51.14. We believe statutes of limitations provide the closest analogy. No one can seriously question the legislature's authority to enact such statutes and provide sanctions for the failure to comply with them. It has been stated that "enact-

> ments limiting the time for the prosecution of offenses are measures of public policy only and are entirely subject to the will of the legislature. . . ." Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880, 882 (1943), quoting 22 C.J.S. Criminal Law section 224 (1961). . . . Articles 32A.02 and 28.061 appear to us to be no more than "enactments limiting the time for the prosecution of offenses," and, as such, are properly within the sphere of legislative authority.

Accord, Hernandez v. State, 713 S.W.2d 697, 699 (Tex. App.—Corpus Christi 1986, no pet.); *Ex parte Maddux,* slip op. at 3 (opinion on State's motion for rehearing).

The point of error is sustained.

The judgment of the district court is reversed, and the indictment is dismissed. Further prosecution for the offense alleged therein is barred.

/s/ MURRY B. COHEN
Murry B. Cohen
Justice

Justices Smith and Hoyt sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered 12 March 1987.

True copy attest:

/s/ KATHRYN COX
Kathryn Cox
Clerk of the Court

NO. 417-87

RIQUE DON BOBBITT, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review
from the First Court of Appeals

(HARRIS County)

OPINION ON STATE'S MOTION FOR REHEARING

Appeal is taken from a conviction for possession of cocaine of less than 28 grams. Appellant filed a pre-trial motion to dismiss, alleging that the prosecution was barred. After a hearing, the trial court denied appellant's motion. Appellant then entered a plea of guilty pursuant to a plea bargain agreement, while reserving the right to appeal on his pre-trial motion. The trial court assessed his punishment at three years imprisonment, probated and a $1,000 fine.

In his pre-trial motion appellant alleged the prosecution was barred because a public intoxication case, which arose from the same transaction, had been dismissed because of a violation of the Texas Speedy Trial Act. Articles 28.061 and 32A.02, V.A.C.C.P. At the hearing on the motion the State stipulated to the fact that both the public intoxication charge and the possession of cocaine charge arose from the same transaction. On direct appeal, the Court of Appeals decided since the Speedy Trial Act was not unconstitutional, Art. 28.061 worked to bar the State from proceeding against appel-

lant on the possession of cocaine charge. Bobbitt v. State, unpublished (No. 01-86-00549-CR, Ct. App.—1st Dist., March 12, 1987).

We granted the State's motion for rehearing to consider the State's third ground for review: whether the Speedy Trial Act is unconstitutional because it violates the separation of powers provisions of Article II, Section 1 of the Texas Constitution. This is not a review of the Municipal Court decision that the public intoxication prosecution was barred by the proscriptions of Article 32A.02, V.A.C.C.P. Instead, this is a review of the Court of Appeals' decision that the dismissal of the public intoxication charge on Art. 32A.02 grounds barred prosecution of the possession of cocaine charge under Article 28.061, V.A.C.C.P. This Court has recently handed down several decisions which control this review.

In Meshell v. State, 739 S.W.2d 246 (Tex. Cr. App. 1987), this Court held that Articles 32A.02 and 28.061, V.A.C.C.P., were unconstitutional because they violated the separation of powers provision of Article II, Section 1 of the Texas Constitution. The Speedy Trial Act was void in its entirety, including Article 28.061, V.A.C.C.P. Maddux v. State, 757 S.W.2d 737 (Tex. Cr. App. 1988). This Court has also explained the Speedy Trial Act was void ab initio. As such, the Speedy Trial Act "justified no act performed under it." Sanchez v. State, 751 S.W. 2d 514 (Tex. Cr. App. 1988). A defendant cannot use a prior dismissal under the Speedy Trial Act to bar a subsequent prosecution for another offense under the authority of Art. 28.061, V.A.C.C.P. *Ex parte Maddux, supra* at 738. We sustain the State's third ground for review.

We reverse the judgment of the Court of Appeals. The judgment of the trial court is affirmed.

PER CURIAM

(Delivered April 12, 1989)

En Banc

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Official Notice
Court of Criminal Appeals

RE: Case No. 0417-87
STYLE: Bobbitt, Rique Don

May 10, 1989

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00549-CR Thomas Lowe, Clerk